A

SITI ATHIRAH MOHD SAPUAN v. RAZANATUL AIN HASSAN & ANOR

COURT OF APPEAL, PUTRAJAYA
MOHD HISHAMUDIN YUNUS JCA
LINTON ALBERT JCA
B TENGKU MAIMUN TUAN MAT JCA
[CIVIL APPEAL NO: B-04-228-08-2014]
22 JUNE 2015

C ***DAMAGES:*** *Personal injuries – Leg – Shortening of leg by 4cm to 5cm – Damages of RM45,000 – Whether sufficient and justified – Whether shortening of leg permanent – Whether further operations required – Whether trial judge followed current trend in arriving at sum awarded – Whether inflation due to passage of time taken into account – Whether RM80,000 reasonable and fair to reflect severity of injuries*

D ***DAMAGES:*** *Personal injuries – Skin grafting – Whether covered by global award – Whether separate award ought to be made – Whether award of RM25,000 reasonable*

EVIDENCE: *Proof of – Road accident – Findings of liability – Failure by* E *defendants to attend court or to tender evidence – Findings of liability made based on evidence not properly tendered – Whether trial judge ought to have ignored evidence – Whether trial judge erred in findings of liability*

TORT: *Negligence – Personal injuries – Liability apportioned 50% on defendant and 50% on plaintiff – Whether gave erroneous impression that both parties equally* F *guilty – Whether plaintiff as victim could only be liable for contributory negligence – Whether contributory negligence is tort of negligence*

The appellant ('plaintiff'), aged 20 years, was riding her motorcycle when suddenly a car from the opposite direction, driven by the first respondent ('the first defendant'), without any signal, turned into her path and collided G into the plaintiff's motorcycle. As a result of the accident, the plaintiff suffered extensive injuries, the most severe of which was on her right leg. The plaintiff had to undergo at least five surgeries on her right leg. The plaintiff claimed for negligence arising from the accident against the defendants in the Sessions Court. The second respondent ('the second defendant') was the H owner of the car and was sued for vicarious liability for the negligence committed by the first defendant. The defendants pleaded contributory negligence on the part of the plaintiff. The defendants were not present at trial to offer any evidence on the collision. At the end of the trial, the Sessions Court Judge ('SCJ') made an inference, based on the first defendant's police I report and the photographs tendered, that the plaintiff was speeding at the material time. The SCJ therefore, finding the defendants liable for the accident, 'apportioned 50% liability' to the defendants and 'apportioned' the

'remaining 50% liability' to the plaintiff. On the issue of quantum, the SCJ awarded damages of RM45,000 to the plaintiff for the open fracture of the right tibia and fibula with shortening, and RM80,000 to the plaintiff, among others, as costs for future operations. Dissatisfied, the plaintiff appealed against the decision whilst the defendants cross-appealed to the High Court. The High Court Judge ('HCJ') was in complete agreement with the SCJ that the plaintiff was speeding at the material time and dismissed both the appeal and cross-appeal. Hence, the appeal by the plaintiff and cross-appeal by the defendants.

Held (allowing plaintiff's appeal; dismissing the defendants' cross-appeal with costs)
Per Mohd Hishamudin Yunus JCA delivering the judgment of the court:

(1) A court is only bound to consider evidence that has been properly tendered as evidence in the court. In the present case, the first defendant did not attend court to testify and her police report was never tendered as evidence before the Session Court. Therefore, both the SCJ and HCJ should have ignored the first defendant's police report completely when deliberating on the findings of liability. The HCJ erred in law in assuming that just because the first defendant's police report formed part of the plaintiff's documents, the police report was admissible evidence in court, and which evidence the SCJ could consider in arriving at her judgment. (para 21)

(2) The court was unable to find an iota of evidence to point to the fact that the plaintiff was speeding at the material time when the accident occurred. The SCJ should not have made a finding that the plaintiff was speeding in the absence of any evidence to that effect. Except for the evidence of the plaintiff herself that she was riding her motorcycle at 50km per hour on the day when the collision took place, there was no evidence to the effect that the plaintiff was speeding, or had exceeded the prescribed speed limit for the stretch of road in question. The court disagreed with the SCJ's finding of speeding on the part of the plaintiff merely based on the extent of the damage to the first defendant's car as seen in the photographs. Hence, the SCJ erred when she made an inference that the plaintiff was speeding or that the plaintiff had contributed to the accident and thus liable for contributory negligence. (paras 24 & 25)

(3) The SCJ also seemed to have directed her mind to a completely wrong approach when making a finding of liability and contributory negligence. The claim, being a claim for the tort of negligence, the appropriate approach to be taken by the SCJ, first and foremost, was to make a finding of mixed fact and law whether or not the first defendant had breached her legal duty of care towards the plaintiff. Only once negligence has been established against the first defendant should the SCJ proceed to determine contributory negligence on the part of the plaintiff. (para 27)

(4) The SCJ also should not have 'apportioned' liability between the parties, and should not use such expression as 'liabiliti sebanyak 50% plaintif dan defendan 50%' if what she had meant was that the plaintiff was only guilty of contributory negligence and that, therefore the award should, accordingly, be reduced by 50%. The expression used by the SCJ gave the erroneous impression that both the plaintiff and the first defendant were co-tortfeasors and each equally guilty (50:50) of the tort of negligence, whereas in truth, there was only one tortfeasor who was guilty of the tort of negligence; the first defendant who was wholly liable for the accident. The plaintiff was only the victim and could only be, if at all, liable for contributory negligence. Contributory negligence is not the tort of negligence. (para 28)

(5) The CT Scanogram conducted by the medical specialists found that the plaintiff had between 4cm and 5cm shortening of her right leg. In this light, the amount given by the SCJ was not found to be reasonable and fair to reflect the severity of the injuries suffered by the plaintiff, as well as taking into account the inflation due to the passage of time. Nowhere did the SCJ, in her grounds of judgment, justify how she had arrived at the sum of RM45,000 for the injuries. The SCJ also had failed to follow the current trend of cases in awarding damages. In the circumstances, the award by the SCJ was set aside and substituted with an award of RM80,000. (para 34)

(6) The global award for skin grafting was inadequate. A separate award ought to have been made by the SCJ. Based on the evidence, including photographs on the skin grafting performed on the plaintiff as well as its extent and the current trend of the courts to grant a separate award for skin grafting, RM25,000 was awarded as damages for skin grafting. (para 35)

(7) Having considered the experts' evidence that the plaintiff had permanent shortening of the leg, the court found that the plaintiff would indeed require further operations. The court took note that due to the disability, coupled with the plaintiff's young age, it was very likely that the plaintiff would require further operations and in this light, the defendant's cross-appeal was dismissed. (para 40)

[The order of the Sessions Court on liability was varied with an order that the defendants be 100% liable with no liability for contributory negligence on the part of the plaintiff. The order of the Sessions Court on quantum was also varied wherein the award for the fracture of the right tibia and fibula with shortening was increased to RM80,000 and a separate award for skin grafting allowed in the sum of RM25,000]

Bahasa Malaysia *Translation Of Headnotes*

Perayu ('plaintif'), yang berumur 20 tahun, sedang menunggang motosikalnya apabila tiba-tiba sebuah kereta dari arah bertentangan, yang dipandu oleh responden pertama ('defendan pertama'), tanpa apa-apa isyarat, membelok ke laluannya dan melanggar motosikal plaintif. Akibat kemalangan tersebut, plaintif mengalami kecederaan teruk, yang paling serius adalah pada kaki kanannya. Plaintif terpaksa melalui sekurang-kurangnya lima pembedahan pada kaki kanannya. Plaintif menuntut bagi kecuaian berbangkit daripada kemalangan tersebut terhadap defendan-defendan di Mahkamah Sesyen. Responden kedua ('defendan kedua') adalah pemilik kereta tersebut dan disaman bagi liabiliti vikarius terhadap kecuaian yang dilakukan oleh defendan pertama. Defendan-defendan memplidkan kecuaian sertaan pada pihak plaintif. Defendan-defendan tidak hadir semasa perbicaraan untuk menawarkan apa-apa keterangan berkaitan dengan kemalangan tersebut. Di akhir perbicaraan, Hakim Mahkamah Sesyen ('HMS') membuat anggapan, berasaskan laporan polis defendan pertama dan gambar-gambar yang dikemukakan, bahawa plaintif memecut pada masa material. HMS oleh itu, mendapati defendan bertanggungan terhadap kemalangan tersebut, 'membahagikan 50% liabiliti' kepada defendan-defendan dan 'membahagikan' 'baki 50% liabiliti' kepada plaintif. Atas isu kuantum, HMS mengawardkan ganti rugi sebanyak RM45,000 kepada plaintif bagi kepatahan tibia dan fibula kanan dengan pemendekan, dan RM80,000 kepada plaintif, antara lain, sebagai kos untuk pembedahan pada masa akan datang. Tidak berpuas hati, plaintif merayu terhadap keputusan tersebut manakala defendan-defendan merayu balas ke Mahkamah Tinggi. Hakim Mahkamah Tinggi ('HMT') bersetuju sepenuhnya dengan HMS bahawa plaintif memecut pada masa material dan menolak kedua-dua rayuan dan rayuan balas tersebut. Oleh itu, rayuan oleh plaintif dan rayuan balas oleh defendan-defendan.

Diputuskan (membenarkan rayuan plaintif; menolak rayuan balas defendan-defendan dengan kos)

Oleh Mohd Hishamudin Yunus HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah hanya terikat untuk mempertimbangkan keterangan yang dikemukakan dengan sewajarnya sebagai keterangan di mahkamah. Dalam kes ini, defendan pertama tidak menghadiri mahkamah untuk memberikan keterangan dan laporan polisnya tidak pernah dikemukakan sebagai keterangan di Mahkamah Sesyen. Oleh itu, HMS dan HMT sepatutnya tidak mengendahkan langsung laporan polis defendan pertama dalam mempertimbangkan dapatan terhadap liabiliti. HMT terkhilaf dari segi undang-undang apabila membuat anggapan bahawa hanya kerana laporan polis defendan pertama membentuk

sebahagian dokumen plaintif, laporan polis tersebut boleh diterima sebagai keterangan di mahkamah, dan keterangan yang mana HMS boleh mengambil kira dalam mencapai penghakimannya.

(2) Mahkamah tidak mendapati secebis pun keterangan untuk menunjukkan fakta bahawa plaintif memecut pada masa material semasa kemalangan berlaku. HMS tidak sepatutnya membuat dapatan bahawa plaintif memecut tanpa apa-apa keterangan terhadapnya. Selain daripada keterangan plaintif sendiri bahawa dia menunggang motosikalnya pada kelajuan 50km sejam pada hari kemalangan, tidak ada keterangan yang menunjukkan bahawa plaintif memecut, atau melebihi had kelajuan yang ditetapkan bagi laluan di jalan tersebut. Mahkamah tidak bersetuju dengan dapatan HMS bahawa plaintif memecut semata-mata berdasarkan tahap kerosakan pada kereta defendan pertama seperti yang dilihat dalam gambar. Oleh itu, HMS terkhilaf dalam menganggap bahawa plaintif memecut atau bahawa plaintif menyumbang terhadap kemalangan tersebut dan oleh itu bertanggungan bagi kecuaian sertaan.

(3) HMS juga dilihat telah mengarahkan mindanya terhadap pendekatan yang salah sama sekali apabila membuat dapatan liabiliti dan kecuaian sertaan. Tuntutan tersebut, sebagai tuntutan bagi tort kecuaian, pendekatan yang sewajarnya diambil oleh HMS, adalah untuk membuat dapatan fakta dan undang-undang yang bercampur sama ada atau tidak defendan pertama telah melanggar kewajipan berjaga-jaga di sisi undang-undang terhadap plaintif. Hanya setelah kecuaian dibuktikan terhadap defendan pertama, HMS boleh meneruskan untuk menentukan kecuaian sertaan pada pihak plaintif.

(4) HMS juga tidak sepatutnya 'membahagikan' liabiliti terhadap pihak-pihak, dan tidak sepatutnya menggunakan pernyataan 'liabiliti sebanyak 50% plaintif dan defendan 50%' jika apa yang dimaksudkannya adalah bahawa plaintif hanya bersalah terhadap kecuaian sertaan dan bahawa, dengan itu award sepatutnya, dikurangkan sebanyak 50%. Pernyataan yang digunakan oleh HMS memberikan tanggapan yang salah bahawa kedua-dua plaintif dan defendan pertama adalah pelaku tort bersama dan setiap seorang bersalah (50:50) bagi tort kecuaian, apabila sebenarnya, terdapat hanya seorang pelaku salah yang bersalah terhadap tort kecuaian; defendan pertama yang bertanggungan keseluruhannya bagi kemalangan tersebut. Plaintif hanyalah mangsa dan hanya boleh, jika ya, bertanggungan terhadap kecuaian sertaan. Kecuaian sertaan bukan tort kecuaian.

(5) Imbasan CT yang dilakukan oleh pakar perubatan mendapati bahawa plaintif mengalami di antara 4cm dan 5cm pemendekan kaki kanannya. Oleh itu, jumlah yang diberikan oleh HMS tidak didapati munasabah dan adil untuk menggambarkan keseriusan kecederaan yang dialami oleh

plaintif, dan juga mengambil kira inflasi berikutan peredaran masa. Tiada di mana-mana pun HMS, dalam alasan penghakimannya, menjustifikasikan bagaimana beliau mencapai jumlah RM45,000 bagi kecederaan tersebut. HMS juga telah gagal mengikuti perkembangan kes-kes semasa dalam mengawardkan ganti rugi. Dalam keadaan tersebut, award oleh HMS diketepikan dan digantikan dengan award sebanyak RM80,000.

(6) Award secara global bagi percantuman kulit adalah tidak mencukupi. Award yang berasingan wajar diberikan oleh HMS. Berdasarkan keterangan, termasuk gambar-gambar bagi percantuman kulit yang dilakukan kepada plaintif serta takat dan perkembangan semasa oleh mahkamah dalam memberikan award berasingan bagi percantuman kulit, RM25,000 diawardkan sebagai ganti rugi bagi percantuman kulit.

(7) Selepas mempertimbangkan keterangan pakar bahawa plaintif mengalami pemendekan kaki secara kekal dan oleh itu dia akan memerlukan pembedahan lanjut, mahkamah mendapati bahawa plaintif sememangnya memerlukan pembedahan lanjut. Mahkamah mengambil perhatian bahawa disebabkan oleh kecacatan tersebut, bersama-sama dengan umur plaintif yang masih muda, berkemungkinan besar plaintif akan memerlukan pembedahan lanjut dan oleh itu, rayuan balas defendan adalah ditolak.

[Perintah Mahkamah Sesyen bagi liabiliti diubah dengan perintah bahawa defendan-defendan 100% bertanggungan tanpa liabiliti untuk kecuaian sertaan pada pihak plaintif. Perintah Mahkamah Sesyen bagi kuantum juga diubah di mana award bagi kepatahan tibia dan fibula kanan dengan pemendekan dinaikkan kepada RM80,000 dan award berasingan bagi percantuman kulit dibenarkan sejumlah RM25,000]

Case(s) referred to:
Abdul Malek Long v. Wan Muhammad Wan Abdullah & Anor [2007] 1 PIR [15] ***(refd)***
Chuah Ah Chee & Ors v. Gurdial Singh & Anor (Civil Suit No. 351 of 1979) (Unreported) ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(refd)***
Kek Kee Leng v. Teresa Bong Nguk Chin & Anor [1977] 1 LNS 45 FC ***(refd)***
Lee Hock Lai v. Yeoh Wah Pein [1998] 1 LNS 364 HC ***(refd)***
Musa Jusoh v. Mazlan Bidin & Anor [2009] 1 PIR [8] ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Zulkifli Rashid & Anor v. Sivasubramaniam Varathan & Anor [2012] 2 PIR [48] ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 12

For the appellant - Harjeet Singh; M/s PS Sohanpal & Sidhu
For the respondents - Farah Nina Zainal Abidin; M/s Dass, Jainab & Assocs

[Appeal from High Court, Shah Alam; Civil Appeal No: 12B-138-03-2013]

Reported by S Barathi

A

JUDGMENT

Mohd Hishamudin Yunus JCA:

Introduction

B **[1]** The appeal before us emanates from the High Court of Shah Alam, namely, Shah Alam High Court; Civil Appeal No. 12B-138-03-2013.

[2] The appeal is by the plaintiff (the appellant before us) against the decision of the learned High Court Judge dated 15 April 2014 dismissing the plaintiff's appeal against the decision of the learned Sessions Court Judge dated 27 February 2013.

C

[3] There is also before us a cross-appeal by the defendants (the respondents before us) against the dismissal of its cross-appeal by the High Court.

D **[4]** The plaintiff's claim in the Sessions Court against the defendants was for negligence arising from a road accident. The plaintiff was the rider of a motorcycle and is suing the first defendant, the driver of a car that had collided with her motorcycle. The second defendant is the owner of the car and is sued for vicarious liability for the negligence committed by the first defendant.

E **[5]** The defendants pleaded contributory negligence on the part of the plaintiff.

Decision Of The Sessions Court

[6] At the Sessions Court, the defendants were not present at the trial. F Although their counsel was present, they did not adduce any evidence. At the end of the trial, the learned Sessions Court Judge found the defendants liable for the accident and "apportioned 50% liability" to the defendants. The learned judge also made a finding of liability against the plaintiff and "apportioned" the "remaining 50% liability" to the plaintiff.

G **[7]** On the issue of quantum of damages, the learned Sessions Court Judge awarded damages amounting to RM45,000 to the plaintiff for open fracture of the right tibia and fibula with shortening, and RM80,000 to the plaintiff as costs for future operations, among others.

H **[8]** Dissatisfied, the plaintiff filed an appeal to the High Court against the decision of the Sessions Court, whilst the defendants cross-appealed against the same. The plaintiff's appeal to the High Court was against the finding of liability as well as on the quantum of damages awarded by the Sessions Court. On the issue of liability, learned counsel for the plaintiff argued that the learned Sessions Court Judge erred in finding the plaintiff liable for I contributory negligence. Instead, it was argued, the first defendant was wholly to be blamed for the accident.

[9] On the issue of quantum of damages, it was argued by the learned counsel for the plaintiff that the learned Sessions Court Judge had erred in her decision when she failed to make an award for damages for skin grafting. The learned counsel also raised issue on the manifestly low award of RM45,000 for fracture of the right tibia and fibula with shortening.

[10] The defendants' cross-appeal in the High Court was against the decision of the Sessions Court in making an award for cost of future operations. The defendants contended that the plaintiff would not be requiring any further operations, as such the Sessions Court should not have granted damages for cost of future operations.

Decision Of The High Court

[11] The High Court dismissed both the plaintiff's appeal and the defendants' cross-appeal.

[12] Hence, this appeal before us.

Decision Of This Court

[13] On 12 February 2015, we allowed the plaintiff's appeal with costs against the decision of the High Court and dismissed the defendants' cross-appeal. The decision of the High Court was accordingly set aside; and the decision of the Sessions Court was varied.

[14] Our decision was unanimous.

The Grounds For Our Decision

[15] We now give our grounds for allowing the appeal.

[16] We will begin by setting out briefly the facts of the case.

The Facts Of The Case

[17] The plaintiff was 20 years old at the time of the accident. The accident occurred on 20 April 2010. According to the plaintiff (PW2), on that fateful day, she was riding her motorcycle along Jalan Klang-Banting, Selangor, when suddenly, a car from the opposite direction, driven by the first defendant, without any signal, turned into her path. The first defendant's car was heading for a junction that was on the plaintiff's left. The plaintiff was unable to avoid the first defendant's car. The car collided into the plaintiff's motorcycle. As a result of the accident, the plaintiff suffered extensive injuries, the most severe of which was on her right leg. Since the accident, the plaintiff had to undergo at least five surgeries on her right leg.

On Liability

[18] As has been mentioned earlier, the first defendant was not present in court at the trial to offer evidence on how the collision occurred. As such, we only have the plaintiff's evidence on the events leading up to the collision.

The investigating officer of the case (PW1) tendered as evidence, the sketch plan (exh. P1) as well as photographs of the scene and of the vehicles involved in the accident (exh. P2 A-D).

[19] At the end of the trial, the learned Sessions Court Judge made an inference, based on the first defendant's police report and the photographs tendered, that the plaintiff was speeding at the material time. The relevant part of the learned Sessions Court Judge's grounds of judgment is reproduced below (at p. 3):

> Di dalam kes ini mahkamah melihat kepada laporan polis Defendan di muka surat 2 di Bundle B yang menyatakan bahawa belum sempat kereta itu membelok ke kanan, tiba-tiba sebuah motorsikal datang dari arah bertentangan melanggar bahagian hadapan kanan. Maka di sini terdapatnya dua keterangan yang berbeza tentang bagaimana keadaan kemalangan berlaku. Walaupun Defendan tidak hadir memberi mahkamah, mahkamah tetap meneliti laporan polis yang telah dikemukakan oleh pihak Defendan. Mahkamah bersetuju dengan penghujahan daripada peguam Defendan dengan melihat pada gambar di mana gambar kenderaan Defendan adalah teruk pada bahagian kanan. Apabila melihat pada keadaan ini, apa yang boleh mahkamah andaikan bahawa motorsikal Plaintif adalah dipandu dalam keadaan laju. Defendan juga perlu mempunyai tugas yang lebih berhati-hati untuk memasuki simpang. Dalam perkara ini Mahkamah bersetuju untuk membahagikan liabiliti yang sama rata ke atas Plaintif dan Defendan. Sepertimana yang telah diputuskan di dalam kes *Hussein & Anor v. Maiden* [1970] 1 MLJ 114 Federal Court yang menyatakan seperti berikut: equal apportionment of liability between cyclist on minor road and motorist on main road as motorist on main road owes duty to be on lookout for other road users crossing minor road.
>
> Berdasarkan alasan-alasan tersebut mahkamah memutuskan untuk liabiliti sebanyak 50% Plaintif dan 50% Defendan.

[20] The learned High Court Judge was in complete agreement with the learned Sessions Court Judge that the plaintiff was speeding at the material time. This, the learned High Court Judge held, was based on the police report of the first defendant and the photographs.

[21] We have had the opportunity to scrutinise all the documentary evidence adduced at the trial court, and with due respect, we are unable to agree with the learned Sessions Court Judge that the plaintiff was liable for contributory negligence. There are two reasons for this. The first is that, the learned High Court Judge, with due respect, fell into error when accepting the learned Sessions Court Judge's finding that the plaintiff was speeding at the material time. The learned Sessions Court Judge arrived at this finding based on the first defendant's police report, a document that was never tendered as evidence in court. We hardly need to stress here that a court is only bound to consider evidence that has been properly tendered before it

and admitted as evidence. Anything else should be completely disregarded by the court. In the present case, the fact remains that since the first defendant did not attend court to testify, her police report was never tendered as evidence before the Sessions Court. As such, both the learned Sessions Court and High Court Judges should have ignored the first defendant's police report completely when deliberating on the finding of liability. We find that, with due respect, the learned High Court Judge erred in law in assuming that just because the first defendant's police report formed part of the plaintiff's documents, therefore, the police report was admissible evidence in court, and which evidence the Sessions Court Judge could consider in arriving at her judgment. In this regard, we find that it is necessary to reproduce the relevant portion of the learned High Court Judge's judgment (as found at p. 5 of the judgment):

> [10] Clear from the above judgment, based on the police report which was part of the Plaintiff's own documents and the damages to the vehicles, the learned Sessions Judge found as a fact that the Plaintiff was speeding at that time. This contributes to the accident. It was held by the Supreme Court in *Lai Yew Seong v. Chan Kim Sang* [1987] 1 MLJ 403 "negligent as used in the expression 'contributory negligence' does not mean breach of duty. It means the failure by the person to use reasonable care for the safety of himself or his property so that he becomes the author of his own wrong. The test of contributory negligent is based entirely on the conduct of the plaintiff in the particular accident or case.

[22] On the failure of the first defendant to testify, we wish to associate ourselves with the Federal Court decision of *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381 at pp. 400-401; [2009] 6 MLJ 751 where Gopal Sri Ram, FCJ (as he then was) said (at p. 761 of the judgment):

> [6] In the present instance, there is no doubt that the first respondent had intimate knowledge of the material facts relevant to the dispute and that she was privy to the several steps through which the transaction had proceeded. Based on the authorities already cited, it is patently clear that the trial judge in the present case ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties. This, the trial judge clearly omitted to do. Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence. His non-direction upon such a crucial point as this certainly amounts to a misdirection which has occasioned a miscarriage of justice.

[23] On the admissibility of the first defendant's police report, we wish to refer to the *dictum* of the High Court in the unreported case of *Chuah Ah Chee & Ors v. Gurdial Singh & Anor* (Civil Suit No. 351 of 1979, High Court, Penang) which was subsequently cited with approval by the Supreme Court in *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509; [1997] 3 MLJ 693 (at p. 529 (CLJ); p. 713 (MLJ) of the judgment):

A However, the effect in law of this report, bearing in mind that it was a self-serving statement made by a person who was not called at the trial, was that it was worthless as evidence being nothing more than hearsay. None of the exceptions to the hearsay rule embodied in s. 32 of the Evidence Act 1950 applied. It makes no difference that it was included in an agreed bundle of documents, because this was done merely to
B dispense with proof of its making, thus obviating the necessity of having to call the recording officer. In other words, its contents were never admitted; were it otherwise, liability would never have been in issue. In this context, counsel for the plaintiffs rightly pointed out that at the time of the inclusion of the report in the agreed bundle, the defendant driver was still alive and so, it was intended to be used only either to corroborate
C or to contradict his version but never as a substitute for oral evidence from the witness box (see s. 60 of the Evidence Act 1950).

[24] The second reason why we find the decision of the High Court flawed is because the learned High Court Judge found the plaintiff liable for
D contributory negligence, based on the allegation that the plaintiff was speeding. We are, with due respect, unable to accept that the plaintiff should be faulted for her misfortune. We have scrutinised the evidence before the Sessions Court, but we are unable to find an iota of evidence to point to the fact that she was speeding at the material time when the accident occurred.

E **[25]** In this regard, we agree with learned counsel for the plaintiff that the learned Sessions Court Judge should not have made a finding that the plaintiff was speeding in the absence of any evidence to that effect. We find that, except for the evidence of the plaintiff herself that she was riding her motorcycle at 50km per hour on the fateful day when the collision took
F place, there was no evidence at all to the effect that the plaintiff was speeding, or had exceeded the prescribed speed limit for the stretch of road in question. The investigating officer (PW1) was never cross-examined on the speed limit of the stretch of road where the accident occurred. With due respect, we disagree with the learned Sessions Court Judge's finding of speeding on the part of the plaintiff merely based on the extent of the damage to the first
G defendant's car as seen in the photographs. That being the case, the learned Sessions Court Judge erred when she made an inference that the plaintiff was speeding, or that the plaintiff had contributed to the accident and thus liable for contributory negligence.

H **[26]** For the above reasons, we find that the plaintiff was not liable for contributory negligence and that both the learned judges of the lower courts had erred when they ruled to the contrary.

[27] At this juncture, we also wish to note with dismay the approach adopted by the learned Sessions Court Judge in establishing liability and
I contributory negligence against the plaintiff. The learned Sessions Court Judge seemed to have directed her mind to a completely wrong approach when making a finding of liability and contributory negligence. Instead of

asking herself whether the first defendant was liable for the tort of negligence, it is clear from her grounds of judgment that she straight away proceeded to scrutinise the conduct of the plaintiff. The present case, being a claim for the tort of negligence, the appropriate approach should have been for the learned Sessions Court Judge, first and foremost, to make a finding of mixed fact and law whether or not the first defendant had breached her legal duty of care towards the plaintiff. Only once negligence had been established against the first defendant should the learned Sessions Court Judge then proceed to determine contributory negligence on the part of the plaintiff, if any (since contributory negligence is pleaded): whether the plaintiff's actions were such that the plaintiff had contributed to the injury or damage that she suffered. In this regard, we wish to refer to the High Court case of *Lee Hock Lai v. Yeoh Wah Pein* [1998] 1 LNS 364; [1999] 5 MLJ 172 where the reasoning process was explained (at p. 175 of the judgment):

> With respect, the learned sessions court judge was fundamentally wrong in her approach. The case she was dealing with - a normal road accident case - essentially concerns the tort of negligence. The proper manner of approaching the case, as with all cases of similar nature, was for the court to evaluate the whole evidence and to make a finding of mixed law and fact (after applying the principles governing the law of negligence to the facts of the case - among which was whether there was a breach of a legal duty to take care by the defendant) as to whether or not the defendant was liable in negligence. If the court were to find that the defendant was not guilty of negligence, then it must dismiss the plaintiff's claim. And in view of the fact that in the present case there was no counterclaim by the defendant against the plaintiff for negligence, that would be the end of the matter! But, if on the other hand, she were to come to a finding that the defendant was liable in negligence, then since in the present case the defendant, in his pleading, had pleaded contributory negligence, she must also consider and make a finding of mixed law and fact (after applying the principles governing contributory negligence to the facts of the case) whether or not the plaintiff was guilty of contributory negligence. And assuming that she were to find the plaintiff guilty of contributory negligence, then the damages recoverable by the plaintiff are to be reduced to such an extent as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage.

[28] Now, considering the manner the grounds of judgment of the learned Sessions Court Judge was written, we are impelled to add here that the learned Sessions Court Judge should not have "apportioned" liability between the parties, and should not use such expression as "liabiliti sebanyak 50% plaintif dan defendan 50%" if what she had meant was that the plaintiff was only guilty of contributory negligence and that, therefore, the award should, accordingly, be reduced by 50%. For, the expression used by the learned Sessions Court Judge gives the erroneous impression that both the plaintiff and the first defendant were co-tortfeasors and each equally guilty (50:50) of the tort of negligence; whereas in truth there was only one

tortfeasor who was guilty of the tort of negligence: the first defendant, who was wholly liable (that is to say, 100%) for the accident. The plaintiff was only the victim and could only be - if at all - liable for contributory negligence. Contributory negligence is not the tort of negligence. One must not get confused between liability for the tort of negligence and liability for contributory negligence. Assuming for the moment that the learned Sessions Court Judge was to find the plaintiff liable for contributory negligence, then she must reduce the damages awarded by the court accordingly, say, 10% or 20% or 30%, as the case may be, in accordance with her assessment as to the extent of the contribution on the part of the plaintiff pertaining to the injury or damages that she had suffered. And assuming that the Sessions Court was to find the plaintiff liable for contributory negligence and that the award must be reduced accordingly, say, by 50%, it does not follow that first defendant's liability for the tort of negligence must consequently be reduced to 50%. The first defendant's liability for the tort of negligence still remains 100%. (But in the instant case we have found the plaintiff not at all liable for contributory negligence.)

[29] For a better understanding of contributory negligence, it is instructive to refer to (a) s. 12 of the Civil Law Act 1956 and (b) the decision of the Federal Court in the case of *Kek Kee Leng v. Teresa Bong Nguk Chin & Anor* [1977] 1 LNS 45; [1978] 1 MLJ 61. Section 12 of the Civil Law Act 1956 provides:

> Apportionment of liability in case of contributory negligence
>
> 12.(1) Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility of the damage:
>
> Provided that-
>
> (a) this subsection shall not operate to defeat any defence arising under a contract; and
>
> (b) where any contract or written law providing for the limitation of liability is applicable to the claim the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the minimum limit so applicable.
>
> (2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the Court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.
>
> ...
>
> (6) In this section "fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence.

[30] In *Kek Kee Leng v. Teresa Bong Nguk Chin & Anor* [1977] 1 LNS 45, the Federal Court held (at p. 63 of the judgment):

> Contributory negligence is an expression meaning "negligence materially contributing to the injury" (see Lord Porter in *Caswell v. Powell Duffryn Associated Collieries*), the word "contributory" being regarded "as expressing something which is a direct cause of the accident" (see judgment of Lord Maugham in *R v. Southern Canada Power Co*). However the word "negligence" is not used in its usual meaning. Negligence ordinarily means breach of a legal duty to take care, but as used in the expression "contributory negligence" it does not mean breach of duty. It means the failure by a person to use reasonable care for the safety of himself or his property so that he becomes the author of his own wrong. More recently, Lord Simon in giving the judgment of the Privy Council in *Nance v. Columbia Electric Ry* said at page 611:
>
> > When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove … that the injured party did not in his own interest take reasonable care of himself and contributed, by his want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.
>
> In short, the question in this case depends entirely on whether the plaintiff could reasonably have avoided the consequences of the 2nd defendant's negligence having regard to the specific findings of the learned judge.

On Quantum Of Damages

Fracture Of The Right Tibia And Fibula With 5cm Shortening

[31] On quantum, the first issue raised by the learned counsel for the plaintiff before us, is that, the award of damages of RM45,000 for the fracture of the right tibia and fibula with 5cm shortening, was extremely low and disproportionate to the injuries suffered by the plaintiff, taking into account the fact that she had to undergo five surgeries after the accident. It was thus submitted by the learned counsel that based on the dearth of case law on this area of injury, a figure of RM80,000 as damages, would be a more reasonable and proportionate amount.

[32] The learned High Court Judge found the amount awarded by the learned Sessions Court Judge was not manifestly low to justify judicial intervention, and dismissed the plaintiff's appeal on this issue.

[33] With due respect, we are unable to agree with the learned High Court Judge. On the contrary, we agree with learned counsel for the plaintiff that the amount of damages awarded by the trial court was manifestly low. We find that nowhere in the learned Sessions Court Judge's grounds of

judgment did she justify how she arrived at the sum of RM45,000 for the above injury. We also find that the learned Sessions Court Judge failed to follow the current trend of cases in awarding damages. We wish to refer to the trend of cases on this heading of injury, including *Abdul Malek bin Long v. Wan Muhammad bin Wan Abdullah & Anor* [2007] 1 PIR [15] where the trial court awarded damages of RM65,000 for closed fracture of the left tibia plateau and neck of fibula, with 1.5cm shortening of the leg, and *Zulkifli bin Rashid & Anor v. Sivasubramaniam a/l Varathan & Anor* [2012] 2 PIR [48] in which the Sessions Court awarded RM50,000 for fracture of the right tibia and fibula with 2cm shortening of the right leg.

[34] In the present case, the CT Scanogram conducted by the medical specialists found that the plaintiff had between 4 and 5cm shortening of her right leg. We, therefore, set aside the award of RM45,000 ordered by the Sessions Court for fracture of the right tibia and fibula with shortening, and substitute it with an award of RM80,000. We do not find the amount given by the Sessions Court as reasonable, and think that RM80,000 is a more reasonable and fair amount to reflect the severity of the injuries suffered by the plaintiff, as well as taking into account inflation due to the passage of time. *Abdul Malek bin Long* was decided in 2007 whilst the present case was decided by the Sessions Court in 2013.

Skin Grafting

[35] Learned counsel for the plaintiff also raised an issue on the failure of the Sessions Court Judge to award damages for skin grafting done on the plaintiff. It was argued by learned counsel that a separate award should be made for this injury, and that the learned Sessions Court Judge had erred in her judgment when she did not consider an award for skin grafting. Before us, the learned counsel for the defendants did not seriously address on this issue of a separate award for skin grafting. The learned High Court Judge held that since the Sessions Court had made a global award for all the injuries suffered by the plaintiff (including RM8,000 for scarring), therefore there was no necessity to make a separate award for skin grafting.

[36] In this regard, learned counsel for the plaintiff drew our attention to the case of *Musa bin Jusoh v. Mazlan bin Bidin & Anor* [2009] 1 PIR [8], a Sessions Court decision where the court made separate awards for fracture, scarring and skin grafting, namely RM20,000 for skin grafting and another RM30,000 for scarring. Relying on the above authority, learned counsel for the plaintiff urged us to consider a separate award for skin grafting and proposed that RM25,000 would be a reasonable figure for skin grafting.

[37] Upon perusing the evidence before us, including photographs on the skin grafting performed on the plaintiff, and the current trend of the courts to grant a separate award for skin grafting, we make an award of RM25,000 as damages to the plaintiff for skin grafting. We find that a separate award for skin grafting ought to have been made by the learned Sessions Court

Judge, and disagree, with due respect, with the learned High Court Judge that the global award made was adequate. We note the extent of skin grafting done on the plaintiff, and find that it is only reasonable that an award of damages be made under this heading.

On The Cross-Appeal

[38] We now turn to the defendants' cross-appeal. The defendants' cross-appeal is against the decision of the High Court in dismissing its appeal there for cost of future operations, wherein the Sessions Court had awarded the plaintiff RM80,000. Learned counsel for the defendants submitted that the learned Sessions Court Judge should not have awarded any damages under this heading. This, learned counsel contended, was based on the expert opinion of Dr Kuldip Singh a/l Swaran Singh (DW1), who testified that the plaintiff would not require any further operations for her injuries, and the medical report prepared by DW1 (exh. D8), which concluded the same.

[39] The plaintiff's expert witness, Dr Suntharalingam a/l Subramaniam (PW4), testified that due to the shortening of the plaintiff's right leg, the plaintiff would require further operations for the lengthening of her leg, and suggested that the operations would cost RM80,000. PW4 strongly recommended future operations for the plaintiff, taking into account her young age and her disability to walk properly.

[40] We have considered both the experts' evidence and we find that the plaintiff would indeed require further operations. In this regard, we prefer to associate ourselves with the opinion of PW4, who opined that due to the permanent shortening of the leg suffered by the plaintiff, she would require further operations. DW1 in his report too had admitted that the plaintiff has permanent shortening of the leg. We take note that due to this disability, coupled with the plaintiff's young age, it is very likely that the plaintiff would require further operations. We thus dismissed the defendants' cross-appeal.

Conclusion

[41] Therefore, for the reasons stated above, we allowed the plaintiff's appeal, and dismissed the defendants' cross-appeal with costs of RM15,000 for here and below.

[42] The order of the Sessions Court to the effect that the liabilities of the parties are:

(a) plaintiff - 50%; and

(b) defendants - 50%,

is varied. Since we find the defendants wholly (100%) liable in negligence towards the plaintiff, and that there is no contributory negligence on the part of the plaintiff, accordingly, we vary the Sessions Court order with an order

A that the defendants be held 100% liable towards the plaintiff for the accident, with no liability for contributory negligence on the part of the plaintiff in respect of the injury or damages that she had suffered.

[43] On quantum, the order of the Sessions Court is now varied in that the award for the fracture of the right tibia and fibula with shortening is now
B increased to RM80,000. There is also a separate award for skin grafting in the sum of RM25,000.

[44] We affirm the rest of the award of the Sessions Court.

Appeal is allowed with costs, cross-appeal is dismissed with costs, order of
C the Sessions Court varied accordingly.

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